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Supreme Court of the United States

October Term, 1946

Nos. 377, 452

JOSEPH S. FAY AND JAMES BOVE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Preliminary Statement

The petitioners were convicted on April 5, 1945, in the Supreme Court, New York County, of the crimes of conspiracy and extortion after a trial before a special jury drawn pursuant to the provisions of Section 749-aa of the New York Judiciary Law. They now challenge their convictions on the ground that the said statute is "unconstitutional and void * * * on its face" (R. 32; petitioners' brief,[1] pp. 4, 16, 41), and that the officials in charge of preparing the list of special jurors "systematically, intentionally, and deliberately" excluded women, laborers and "persons of humble station in life," with result that the petitioners were denied the equal protection of the laws and due process of law (R. 33; petitioners' brief, pp. 15-17).

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[1] The brief filed by the petitioner Bove merely adopts the arguments advanced by his co-petitioner. Accordingly, we refer to the one filed by Fay as the "petitioners' brief."

The proceedings below, the nature of the prosecution, the questions presented and respondent's position thereon, the pertinent statutory provisions and their application to the facts at bar, and a summary of the relevant evidence are all set forth at pages one to thirteen of the respondent's brief in opposition to petition for writ of certiorari—which will hereinafter be referred to as the respondent's "certiorari brief." References therein are to pages of the transcript of proceedings below, which have become folios of the Transcript of Record. Unless otherwise indicated, references herein are to pages of the Transcript of Record.

Outline of Argument

Our argument will be presented under three headings:

I. The New York special jury law is fair on its face and was appropriately invoked in the instant case.

II. The evidence conclusively establishes that the officials responsible for preparing the list of special jurors did not discriminate against any class or category of qualified persons.

III. Even if the petitioners had established that women, laborers and "persons of humble station in life" had been deliberately excluded from the special jury panel, no constitutional question would have been presented.

A. Since the jurors empanelled were fair and impartial, the requirements of due process were fully satisfied.

B. Since the petitioners do not belong to any excluded class and have failed to show how the alleged exclusion could have affected the verdict, they are in no position to raise a question of equal protection.

POINT I

The New York special jury law is fair on its face and was appropriately invoked in the instant case.

The New York special jury statute has been in effect without pertinent change since 1896.[2] It has been said to present "no due process question requiring review by this court" (*Buchalter* v. *New York*, 319 U. S. 427, 430).

Its essential purpose is to facilitate "the administration of justice in criminal cases" by providing a readily available list of "fair, competent and impartial" jurors, eliminating "those who should not sit, or who would be disqualified from acting • • • whether from the standpoint of the prosecution or of the defendant" [*People* v. *Dunn* (1899) 157 N. Y. 528, 532, 537]. To this end, it provides a list of special jurors to be selected "from the persons qualified to serve as trial jurors." So far as here relevant, the statute excludes from the special jury list anyone who:

(a) "doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression"; or

(b) has such "opinion as to circumstantial evidence • • • as would prevent his finding a verdict of guilty upon such evidence"; or

(c) "avows such a prejudice against any particular defense to a criminal charge as would prevent his giv-

[2] Compare Laws of 1896, ch. 378, §§ 8, 13 with Judiciary Law, § 749-aa; subds. 2, 4; see "Statutory Provisions Concerning General and Special Jurors; and Their Application to the Case at Bar"—respondent's certiorari brief, pp. 3-8. See appendix B page 31

ing a fair and impartial trial upon the merits of such defense"; or who

(d) "avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal [so] to testify * * * shall not create any presumption against him."

Applications for trial before juries drawn from this special list are addressed to the discretion of the trial court, may be made by either side, and may be based upon any fact establishing that the "due, efficient and impartial administration of justice" will thereby be advanced (Judiciary Law, § 749-aa, subd. 4; respondent's certiorari brief, p. 6).

The foregoing statutory scheme seeks to promote the "fair, competent and impartial" administration of justice in the criminal courts [3] by establishing a special list of talesmen having qualifications which are particularly essential to the fair consideration of highly publicized and hotly contested criminal actions (*cf.* R. 49-50, 56). The standards adopted by the legislature—now "embodied in the questionnaire which is given to each prospective juror" (R. 42, 508A)—are appropriately designed to achieve this purpose.

But beyond that, no constitutional question would have been presented even if the statute had failed to set up any standards, but had left the matter of jury selection en-

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[3] It is for such purposes that special juries of one sort or another have been employed from the inception of the common law [see *People* v. *Tweed* (Sup. Ct. N. Y. Co. 1876) 50 How. Prac. 262, 263; *Rex* v. *Edmonds* (1821) 4 Barn. and Ald. 471, 476-477; see, also, Thayer, *Preliminary Treatise on Evidence at the Common Law* (1898) pp. 94, 96-97; Thompson and Merriam, *On Juries* (1882) p. 12; Goebel and Naughton, *Law Enforcement in Colonial New York* (1944) pp. 619-620].

tirely to the discretion of the deputy county clerks (*Murray* v. *Louisiana*, 163 U. S. 101, 108; *Williams* v. *Mississippi*, 170 U. S. 213, 225; *Franklin* v. *South Carolina*, 218 U. S. 161, 167-168; *Akins* v. *Texas*, 325 U. S. 398, 403; see also *Ex parte Virginia*, 100 U. S. 339, 348).

Nor is there any merit in the petitioners' assertion that the trial court's action in granting the application for a special jury was "without justification" (petitioners' brief, p. 26). On the contrary, each of the statutory qualifications set forth at pages 3-4, *supra*, is peculiarly applicable to the instant prosecution.

a. The petitioners themselves were the first to invoke the extraordinary publicity this prosecution had received as a reason for judicial action. On that ground, they initially applied for a transfer of the case from the Court of General Sessions to the Supreme Court [R. 26; 48 N. Y. Supp. (2d) 2, 4], and then moved for a change of venue to another county (R. 86-90, 510A). They must, therefore, admit the importance of eliminating from the panel any juror who doubted his ability "to render an impartial verdict upon the evidence" uninfluenced by impressions "formed from newspaper reading."

b. The basic charge against the petitioners was conspiracy (R. 4-7)—one which must ordinarily be proved by circumstantial evidence (see *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 612; *Glasser* v. *United States*, 315 U. S. 60, 80). Hence, no juror whose "opinion as to circumstantial evidence • • • would prevent his finding a verdict of guilty upon such evidence" would be competent to serve.

c. The petitioners interposed a peculiarly unpopular defense. Admitting that they had personally received over $300,000 from employers of laboring men whom they pur-

ported to represent, the petitioners contended that they were not guilty of extortion because they had received the money as bribes (R. 386, 393, 414, 468; respondent's certiorari brief, p. 2). It was, therefore, vital to eliminate any prospective juror who harbored "such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense."

d. Neither petitioner took the witness stand in his own defense, which made it essential that the jury be composed of persons able to give them "the full benefit of the statutory provision that such * * * neglect or refusal to testify * * * shall not create any presumption against" them.

In Summary: The statute is not only fair on its face, but the wisdom and appropriateness of its terms are aptly illustrated by the very circumstances now before the Court.

POINT II

The evidence conclusively establishes that the officials responsible for preparing the list of special jurors did not discriminate against any class or category of qualified persons.

The uncontradicted testimony of Deputy County Clerks McGurrin and Kane establishes that New York County's special jury list was prepared without trace of discrimination against any class or category of qualified persons (see "Evidence Concerning the Selection of General and Special Jurors" and "Argument"—respondent's certiorari brief, pp. 9-16). Thus, the choice of its talesmen was in no way influenced by the nature of their occupations, the extent of their formal education, their place of residence, or by any

factor that might result in discrimination along economic or social lines (R. 59-63, 71, 81); the officials in charge were not even aware of the panel's social or economic composition (R. 60-2); and their sole concern was to provide a list of special jurors who would meet the statutory qualifications and would intelligently perform their vital function of giving every defendant a "fair" and "proper" trial (R. 46, 51, 76, 80).

The petitioners now seek to dispose of this uncontradicted testimony of their own witnesses by simply asserting that "The officials of the Division of Jurors denied this [discrimination], as such officials uniformly do in these cases" (petitioners' brief, p. 19).

We shall demonstrate that the officials in charge of jury selection were without motive—either official or personal—to indulge in unlawful discrimination or to commit perjury in open court (A, *infra*, pp. 7-11); that every argument now advanced to suggest that they have done so is without basis (B, C and D, *infra*, pp. 11-15); and that the petitioners' statistical tables do not suggest intentional, or even accidental, discrimination against any class or category of qualified persons (E, *infra*, pp. 15-19).

A. *The officials in charge of jury selection were without motive to discriminate against any class or category of qualified persons, or to commit perjury on the witness stand.*

The petitioners' entire factual argument rests upon the unstated premise that the New York County special jury list was called into being to meet the exigencies of the present prosecution and, accordingly, that the officials in charge of its selection had some overriding motive to pack it with persons from the "upper stratum of economic and

social life" who were believed to be prejudiced against union leaders and those of "humble station in life" (R. 33). Failing such a premise, there would be no justification for the petitioners' apparent belief that every ambiguity in the record constitutes proof of official wrongdoing,[4] or for their offhand dismissal of the testimony of their own witnesses as an unrelieved picture of brazen perjury.

The fact is that the list of special jurors was compiled neither for particular use in the present case nor for the general purpose of prosecuting labor leaders and others similarly situated. On the contrary, it was the product of a gradual growth over the years (R. 64), during which time it was used in a wide variety of situations. In many of these only disaster to the state could result from the use of jurors prejudiced against the humble or in favor of the wealthy (see tabulation of reported cases tried before special juries since 1938, respondent's certiorari brief, p. 14, n.5).

For example, in *People v. Alexander* (1944) 293 N. Y. 870, a landlord was convicted of manslaughter as a result of his negligence in maintaining a Chinatown tenement which had been destroyed by fire. The defendant's principal contentions were that he had been without notice of the conditions alleged to have established his liability; that the evidence against him was concocted by the surviving

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[4] Despite the settled doctrine that one who challenges state action before this Court must affirmatively establish every circumstance necessary to his attack (*Akins* v. *Texas*, 325 U. S. 398, 400-401; also *Tarrance* v. *Florida*, 188 U. S. 519, 520; *Martin* v. *Texas*, 200 U. S. 316, 321; *Glasser* v. *United States*, 315 U. S. 60, 87), petitioners seem to assume that where "there is no evidence whatever" concerning a given fact, such fact must be deemed to have been conclusively established in their favor (see, *e. g.*, petitioners' brief, pp. 19, 27).

tenants in order to fasten civil liability upon their wealthy landlord; and that his conviction would bring "woe unto the citizenry of this city * * * that own real estate here or own mortgages here," and, indirectly, unto the tenants dependent upon such "citizenry" (see *People* v. *Alexander*, record on appeal, defendant's summation, pp. 2955, 2961-2, 2967, 3044). In *People* v. *Schwartz* (1st Dept. 1945) 270 App. Div. 218, aff'd 296 N. Y. 547, four bankers and insurance men were convicted of operating a small-loan company (Madison Personal Loan, Inc.) in such manner as to exact usurious interest from its improvident borrowers. There, again, the victims of the crime were exclusively people of "humble station in life," while the defendants were members of the banking fraternity who, indeed, were able to call as character witnesses the principal officers of some of the city's leading financial institutions (see defendant Schwartz' Appellate Division brief, p. 4). *People* v. *Greenberg* (1st Dept. 1945) 269 App. Div. 1028, cert. den. 325 U. S. 877, involved the conviction of a manufacturer for income tax evasion.

Such use of the special panel is at war with the hypothesis that those in charge of its selection had official motive to fashion it as an instrument for protecting the wealthy or harassing the poor and the humble.

Moreover, the state itself moved for a special jury in each of these cases, where no prosecutor would willingly have risked going before a jury which considered itself to be the "organ of" any supposedly superior "social and economic class" (*cf.* petitioners' brief, p. 22). It is therefore clear that the district attorney's office—which should have been in a position to make accurate judgment of the matter—knew that the special panel's personnel was subject to none of the criticisms now suggested by the petitioners.

Not only is the absence of official reason for prejudicial action clearly established, but the record wholly fails to suggest any personal motive for discrimination on the part of those charged with jury selection. In this respect, the instant situation presents a striking contrast to every case in which this Court has invalidated a state conviction on the ground of an improperly selected jury.[5] In each such instance, the challenged jury had been selected by members of the dominant class in the community, whereas the excluded persons were members of a clearly defined minority group, for whose protection against majority prejudice specific constitutional and statutory measures had been enacted (see *Strauder* v. *West Virginia*, 100 U. S. 303, 306; U. S. C. Title 8, § 44). Indeed, the officials in charge of jury selection either candidly admitted, or obviously entertained, the conviction that public policy required the minority group's participation in jury service to be kept within the narrowest limits permissible under the rules laid down by this Court (see, *e. g.*, *Neal* v. *Delaware*, 103 U. S. 370; *Smith* v. *Texas*, 311 U. S. 128; and *Hill* v. *Texas*, 316 U. S. 400).

Thus, in the *Neal* case, the State of Delaware frankly conceded that "none but white men" were selected as jurors, but sought to justify the practice by arguing that "the great body of black men residing in this State are utterly unqualified . . . to sit on juries" (103 U. S., at pp. 393-394). In the more recent *Smith* and *Hill* cases, the Court took special note that the jury commissioners had been aware that no Negroes were appearing on panels selected by them and had even "discussed" the matter (311 U. S., at p. 131; 316 U. S., at p. 404).

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[5] See *infra*, page 23, note 12.

In the instant case, on the other hand, there is no indication that those charged with selecting the special jury—two deputy county clerks and three "examiners" (R. 40, 44-6, 75)—themselves belonged to the "upper stratum of economic and social life," or that they were afflicted with social or economic bias of any kind.

In brief, nothing in the evidence casts reflection upon the personal or official integrity of those charged with selecting jury panels in New York County. There is no justification for the petitioners' cavalier assertion that these men first violated their constitutional oaths of office by unlawfully discriminating against certain classes of qualified persons, and then—"as such officials uniformly do"—proceeded to compound their offense by giving perjured testimony in open court. Certainly, the record contains no evidence to suggest that the contrary findings of three separate state tribunals (R. 85, 518-9, 533-4) were arbitrary, capricious or unreasonable (see *Akins* v. *Texas*, 325 U. S. 398, 401-402).

B. *There was no impropriety in questioning prospective jurors as to their preferences respecting time of service.*

One of the inquiries appearing on the questionnaire signed by all jurors is the following (R. 508A):

> "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months) _____"

As explained at pages 11 to 12 of our certiorari brief, the purpose of this question—inserted in the questionnaire with approval of the Appellate Division (R. 71-2)—is to enable the county clerk to accommodate jurors by having them

called only during the months in which they can most conveniently serve. In regard to special jurors, however, it is impossible, as a practical matter, to predict during what season, or for how long, their services will be required (respondent's certiorari brief, p. 12, n.4). Accordingly, only persons "available for service any time" are placed on the special list (R. 49-50, 67-8). This practice is clearly a proper one [*cf. People* v. *Chrisoulas* (1937) 367 Ill. 85, 88-89], and can give rise to no constitutional question.

Moreover, there is no evidence that it was employed for any but its proper and intended purpose; that a talesman's expression of preference was affected by his economic or social status; or that a single person of "humble station in life" was thereby eliminated from the special panel.

C. *There was no exclusion of women.*

Under New York law, women are granted an absolute and unconditional exemption from jury service (Judiciary Law, § 599, subd. 7; respondent's certiorari brief, Appendix A, pp. 22-23). Finding that "such a large, large percentage" of women habitually claimed their exemption (R. 75), the officials in charge of the division of jurors quite sensibly concluded that it would merely give rise to useless irritation to compel unwilling women to present themselves for examination at the county clerk's office [*cf. Rawlins* v. *Georgia*, 201 U. S. 638, 640; *United States* v. *Brady* (D. C. D. Md. 1942) 47 Fed. Supp. 362, 365, aff'd 133 Fed. (2d) 476, 478, cert. den. 319 U. S. 746, 784], and that a greater number of women jurors could ultimately be obtained by encouraging them to volunteer for service [R. 43, 75; *cf. Walker* v. *United States* (C. C. A. 8th 1937) 93 Fed. (2d) 383, 390-391, cert. den. 303 U. S. 644].

Nothing in these circumstances even remotely suggests the deliberate exclusion of women from jury service in New York County. Nor can the jury officials be criticized for their belief that volunteers for duty would most likely be found among women known to be "civic conscious" (*cf.* petitioners' brief, p. 23).

There is no similarity between the instant situation and the one considered in *Glasser* v. *United States*, 315 U. S. 60. It was there alleged that "all the names of women placed in the box from which the panel was drawn were taken from a list furnished * * * by the Illinois League of Women Voters, and prepared exclusively from its membership, [and] that the women on that list had attended 'jury classes whose lecturers presented the views of the prosecution'" (315 U. S., at pp. 83-84). The Court held that, had the petitioners established the "deliberate selection of jurors from the membership of particular private organizations," an "abuse of discretion" would have been established (315 U. S., at pp. 86-87).

Here, there is no suggestion that the women appearing on the special panel had been selected "from the membership of particular private organizations" or that a single special juror had attended "jury classes" or belonged to the League of Women Voters or any other "private" organization. None of the three women examined on the *voir dire* was questioned as to her membership in such organizations (R. 224-7, 269-73, 340-1; see respondent's certiorari brief, p. 10, n.3). Indeed, the only pertinent testimony is that of Mr. McGurrin that no jurors were on the special list as result of recommendation by any "public or civic" group (R. 65-6).

D. *Nothing in the reports of the Judicial Council casts doubt upon the constitutionality of New York County's special jury system.*

At pages 27 to 32 of their brief, petitioners set forth numerous excerpts from various reports of the New York Judicial Council and conclude therefrom that the use of a special jury "as distinguished from a general jury" operates to deny a defendant "the equal protection of the laws in violation of the Fourteenth Amendment" (brief, p. 33).

While the quotations used by the petitioners establish that the Judicial Council is in favor—as a matter of legislative policy—of repealing Section 749-aa of the Judiciary Law, the Council has never expressed doubt of the constitutionality of the statute as applied in New York County. In fact, every member called upon to pass on the question has concurred in one or more decisions upholding New York County's special jury panel.[6] Two of the Council's members, Chief Judge LOUGHRAN and Presiding Justice MARTIN, did so in this very case (R. 521, 533).

In brief, the considerations urged by the Judicial Council were put forward in pursuance of its statutory duty to "recommend * * * to the legislature any changes in the

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[6] CRANE, CH. J., Chairman, 1935-1939
People v. *Lunse* (1938) 278 N. Y. 303, 314-315

LEHMAN, CH. J., Chairman, 1941-1945
People v. *Lunse*, *supra*
People v. *Cullen* (1943) 290 N. Y. 667 (see appellant Shonbrun's brief, p. 15)

LOUGHRAN, CH. J., Chairman, 1945 to present
People v. *Cullen*, *supra*

MARTIN, P. J., member during entire period
People v. *Comprodaily Publishing Co.* (1st Dept. 1941) 262 App. Div. 1008 (see appellants' brief, pp. 5 to 22)

• • • methods of conducting the business in the courts which can be put into effect only by legislative action" [Judiciary Law, § 45 (e)], and its arguments present no judicial question. As the Court recently ruled, in refusing to consider a policy attack upon certain federal legislation (*Packard Motor* v. *N. L. R. B.*, no. 658—October Term, 1946):

> "However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them."

E. *Nothing in the petitioners' "survey" suggests discrimination against any class or category of qualified jurors.*

The only affirmative evidence produced by the petitioners was a so-called "survey" made by one Warren H. Mayell, an attorney associated with counsel for the petitioner Fay, who examined the original questionnaires on file at the county clerk's office, "found various occupations listed thereon" and "tried to classify them to groups, making them not too numerous" (R. 81-2).

Realizing the inadequacy of this "survey," the petitioners now present two further tables. One, allegedly prepared by the Bureau of Labor Statistics of the United States Department of Labor, regroups the Mayell classifications "to correspond as well as possible" with those of the 1940 federal census (petitioners' brief, pp. 11 to 12). The second purports to correlate such regrouped classifications with census figures for New York County (*id.*, p. 13).

Since these tables are based upon an interested and non-expert witness' attempt "to classify them [the special jurors] to groups" (R. 82) and upon an anonymous statistician's effort to make the first classification "corre-

spond as well as possible" to census figures (petitioners' brief, p. 11), they clearly do not constitute the type of evidence required of one seeking to invalidate a state conviction on federal grounds (see *Buchalter* v. *New York;* 319 U. S. 427, 431; *Akins* v. *Texas;* 325 U. S. 398, 401).

However, accepting the final table at its face value, it suggests nothing to indicate that the list was deliberately, or even accidentally, weighted in favor of the wealthy or socially elect. On the contrary, it is clear that any disproportions which may have been present were the inevitable by-products of the ordinary processes of jury selection.

The alleged predominance of "Professional" and "Clerical" workers, claimed to represent 56.8 percent of the list, is attributable to the recognized tendency of those categories to produce "jurors * * * whose service, by reason of their intelligence and character, would be highly desirable" (*United States* v. *Wood*, 299 U. S. 123, 148, 150).[7] Any deficiency of "Laborers," "Service workers," or "Operatives and kindred workers" is attributable to equally apparent considerations. Those categories are comprised of the very persons upon whom jury service would be so burdensome[8] that a "judge would be justified in excusing"

[7] This quotation refers to government employees resident in the District of Columbia, who would clearly fall within the categories under discussion.

[8] In February 1945, the average daily earnings of production workers in manufacturing industries in New York City were approximately $9.55, while laborers engaged in construction work were then earning approximately $12.65 per day (see Statistical Summary 1945 published by the New York State Department of Labor, Tables 8, 11 and 13; and the March-April issue of the Industrial Bulletin and Employment Review, p. 129). Jury fees being $3.00 a day, a construction worker would have been out of pocket approximately $125.45 by serving on the instant jury, whereas in the *Schwartz* case discussed at p. 9, *supra*, the cost to such a juror, assuming the same wage scale, would have been $299.15.

them on the ground of "undue financial hardship" (*Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 224). It being permissible for a "judge" to excuse jurors on such grounds, no constitutional question could be presented because the state may have assigned the function to non-judicial officers (*supra*, pp. 4-5; *Murray* v. *Louisiana*, 163 U. S. 101, 108; see *Akins* v. *Texas*, 325 U. S. 398, 402).

Nor is there basis for the suggestion that "Professional" and "Clerical" workers would tend to be hostile to union men or labor leaders. On the contrary, current headlines indicate that such persons are now perhaps the most union-conscious element of our labor force.[9] The records of the Court of Appeals disclose that as far back as 1938, the Metropolitan Life Insurance Company was engaged in a futile battle to avoid bargaining with the "Industrial Insurance Agents Union, Local 30, affiliated with the United Office & Professional Workers of America, C.I.O." (*Metropolitan Life Insurance Co.* v. *Labor Relations Board*, 280 N. Y. 194, 203-204).[10]

In this connection, it is significant that of forty-three talesmen questioned in such manner as to bring out any

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[9] Appendix A, *infra*, sets forth representative 1946-1947 headlines from the New York Times.

[10] Official reports further disclose completed litigations and New York State Labor Relations Board proceedings involving the following categories of professional, managerial and clerical employees (partial listing): **Advertising Employees** (artists, display, promotion): *Reuben H. Donnelley Corp.*, 5 S. L. R. B. 811; *Caroline G. Davis, Inc.*, 6 S. L. R. B. 386; *United Whelan*, 9 S. L. R. B., No. 3552; *Strauss Stores Corp.*, 9 S. L. R. B., No. 3879; *Lord & Taylor*, 10 S. L. R. B., No. 4006. **Bank and Title Company Employees** (clerks and tellers): *Bank of Yorktown* v. *Boland* (1940) 284 N. Y. 749; *Public National Bank & Trust Company of New York*, 8 S. L. R. B. 558; *Greenpoint Savings Bank*, 10 S. L. R. B., No. 4011; *Bank of Manhattan*, 10 S. L. R. B., No. 4010; *Security Title & Guarantee Co.*, 5 S. L. R. B. 178; *Title Guarantee & Trust Co.*,

(Continued on page 18)

possible union affiliations, seven, each of whom was the type of worker under discussion, were present or former union

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(Continued from page 17)

5 S. L. R. B. 180, 6 S. L. R. B. 914; *Lawyers Title Corporation of New York*, 5 S. L. R. B. 286. **Credit Clerks and Collectors:** *Gas Consumers Assn.*, 1 S. L. R. B. 492; *Abraham & Straus, Inc.*, 4 S. L. R. B. 349; *Busch Jewelry Co.*, 4 S. L. R. B. 617. **Draftsmen:** *Marble Industry Employers' Assn.*, 4 S. L. R. B. 388. **Insurance Company Employees** (agents and clerks): *John Hancock Mutual Life Ins. Co.*, 3 S. L. R. B. 98, 654; *Prudential Ins. Co.*, 4 S. L. R. B. 788; *Butchers Mutual Casualty Co.*, 7 S. L. R. B. 12; *United Mutual Life Ins. Co.*, 8 S. L. R. B. 125; *Workingmen's Cooperative Assn.*, 1 S. L. R. B. 256. **Managers** (including theatre, store, office, district superintendents): *National Shoe Stores*, 3 S. L. R. B. 150; *Florsheim Shoe Store Co.*, 3 S. L. R. B. 296; *J. J. Theatres, Inc.*, 5 S. L. R. B. 1106; *Rand Tea & Coffee Stores, Inc.*, 7 S. L. R. B. 100; *RKO Service Corp.*, 7 S. L. R. B. 175; *Thomas Roulston, Inc.*, 7 S. L. R. B. 287; *Gulf Oil Corp.*, 8 S. L. R. B. 285; *Oppenheim Collins*, 9 S. L. R. B., No. 3468. **Pharmacists:** *Labor Relations Board* v. *Timen* (1st Dept. 1944) 264 App. Div. 120; *United Cigar-Whelan Stores Corp.*, 1 S. L. R. B. 108; *Barbizon Plaza Pharmacy*, 3 S. L. R. B. 662; *Breitenbach Pharmacy, Inc.*, 8 S. L. R. B. 597. **Musicians, Conductors, Opera Artists:** *American Guild of Musical Artists, Inc.* v. *Petrillo* (1941) 286 N. Y. 226; *Opera on Tour, Inc.* v. *Weber* (1941) 285 N. Y. 348. **Office Workers** (including junior executives): *Labor Relations Board* v. *Interborough News Co.* (Sup. Ct., N. Y. Co. 1939) 170 Misc. 347; *Gulf Oil Corp.*, 2 S. L. R. B. 568, 8 S. L. R. B. 41; *International Railway Co.*, 2 S. L. R. B. 250; *Singer Sewing Machine Co.*, 2 S. L. R. B. 255; *Saks & Co.*, 4 S. L. R. B. 879; *Revere Copper and Brass Inc.*, 8 S. L. R. B. 351, 358; *United Traction Co.*, 8 S. L. R. B. 493; *S. H. Kress and Co.*, 8 S. L. R. B. 612; *Oppenheim Collins*, 9 S. L. R. B., No. 3468. **Postal Clerks:** *Railway Mail Assn.* v. *Corsi* (1944) 293 N. Y. 315.

The respective volumes of the State Labor Relations Board Reports contain decisions and orders dated as follows: Volumes 1 (July 1, 1937-Dec. 31, 1938); 2 (1939); 3 (1940); 4 (1941); 5 (1942); 6 (1943); 7 (1944); 8 (1945). Volumes 9 (1946) and 10 (1947) are unpublished, and references are to case numbers.

members.[11] One of them was a member of the executive board of the Apartment House and Superintendent Managers Union Local 219 (A. F. of L.) (R. 150-1).

Finally, there is no evidence (*cf. supra*, p. 8, n.4) that the occupational composition of the special panel was in any way different from that of the concededly fair general list. On the contrary, the only pertinent testimony is that both lists were prepared by the same officials under identical conditions, and that occupational differences played no part in determining upon which panel a talesman might find himself (see respondent's certiorari brief, pp. 15-16).

In summary: The officials charged with selecting New York County's special panel, called to the stand by the petitioners, unequivocally testified that the panel was chosen without discrimination against any class or category of qualified persons. The petitioners' statistical tables, taken at their face value, do not suggest improper discrimination of any kind but disclose only the disproportions incident to the normal processes of jury selection.

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[11] Harvey W. Frank, engineer, former member of the New York Telephone Employees Union (R. 94, 98); William H. Conboy, bill investigator, present member of the Brotherhood of Consolidated Edison Employees (R. 113, 117); Walter R. Butler, apartment house superintendent, present member of the executive board of the Apartment House and Superintendent Managers Union Local 219 (A. F. of L.) (R. 150-1); Ruth F. Bien, former school teacher, former member of Local 5 of the Teachers Union (R. 226); Louis Spahn, apartment house superintendent, former member of the United Brotherhood of Carpenters and Joiners and of the International Association of Machinists (both A. F. of L.) (R. 263-4); Philip F. Brady, electrical foreman, former member of the Brotherhood of Electrical Workers Local 3 (A. F. of L.) and Brotherhood of Consolidated Edison Employees (R. 309-11); Junius H. Smith, bookkeeper [?], present member of an unidentified union which apparently had a closed shop agreement covering the employees of Brooks Brothers (R. 353-4).

POINT III

Even if the petitioners had established that women, laborers and "persons of humble station in life" had been deliberately excluded from the special jury panel, no constitutional question would have been presented.

Assuming that the petitioners had established all their factual claims, they would still have failed to present a question of due process or of equal protection.

The petitioners' failure to show that a single juror empanelled in this case had "actual bias" either against them or in favor of the prosecution is a complete answer to any claim based on due process (A. *infra*, pp. 20-23).

Although questions of equal protection have heretofore been found to exist only when persons had been excluded from a jury on grounds of race, religion or political affiliation (see cases cited petitioners' brief, p. 18), it is the petitioners' contention that the Court should now extend the doctrine to cover alleged exclusion based on considerations of sex, occupation or ecomonic status. However, since the petitioners belong to none of the classes now claimed to have been excluded and have failed to show how the alleged exclusion could have affected the verdict, they are in no position to raise a question of equal protection (B. *infra*, pp. 23-25).

A. *Since the jurors empanelled were fair and impartial, the requirements of due process were fully satisfied.*

The petitioners were tried before a jury selected after extensive voir dire examination, during which every one of their challenges for cause was sustained by the trial court (R. 186, 208, 238-9, 297), and at the conclusion of which

each of the twelve jurors and two alternates had been declared "satisfactory" (R. 112, 172, 189, 192, 202, 244, 269, 273, 277, 333, 348, 358) or "acceptable" (R. 283, 322) to the defense. The petitioners having thus failed to make a "convincing showing of actual bias on the part of the jury which tried" them, they can assert no claim under the due process clause (*Buchalter* v. *New York*, 319 U. S. 427, 430; see also *Spies* v. *Illinois*, 123 U. S. 131, 179-180).

Due process does not require a state to select its jurors from any particular portions of its population, but leaves it free to adopt any rules which, as an end result, provide "impartial" finders of fact (*Brown* v. *New Jersey*, 175 U. S. 172, 175-176; see also *United States* v. *Wood*, 299 U. S. 123, 145-146).

Thus, the state may confine its jury service to "males"; may require jurors to be "freeholders" or "poll tax" payers; and may prescribe appropriate educational requirements (*Strauder* v. *West Virginia*, 100 U. S. 303, 310; *Neal* v. *Delaware*, 103 U. S. 370, 386; *In re Wood*, 140 U. S. 278, 284; *Gibson* v. *Mississippi*, 162 U. S. 565, 580; *Williams* v. *Mississippi*, 170 U. S. 213, 221-222; *Akins* v. *Texas*, 325 U. S. 398, 402, n.3). Moreover, it makes no difference whether permissible exclusion is accomplished by express statutory mandate or by administrative action (*Rawlins* v. *Georgia*, 201 U. S. 638, 640).

In brief, a defendant tried before a jury in a state court can no more challenge his conviction on the ground that the jurors were drawn from a panel which did not represent an economic and social cross-section of the community, than one tried before a judge without a jury could gain his freedom by making similar criticism of the state's judiciary.

Apt illustration of the principle that due process does not require jury panels to be representative cross-sections of the community is found in *Ballard* v. *United States*, 67 Sup. Ct. 261, 263, 264, 91 Law. ed. (adv.) 195, 197, 198. There, the Court expressly found that the exclusion of women from a jury might render it "less representative of the community than would be true if any economic or racial group were excluded." However, it recognized that, even in the federal courts, female representation is required only "in such States" where women are "eligible for jury service under local law."

Nothing in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, casts doubt upon the foregoing principles of constitutional law. The Court there ruled that federal juries, in so far as possible under controlling state legislation, must be "drawn from a cross-section of the community" (at p. 220). However, the Court, citing *McNabb* v. *United States*, 318 U. S. 332, 340, pointed out that it was not deciding a due process question, but was acting in the exercise of its "power of supervision over the administration of justice in the federal courts" (328 U. S., at p. 225).

At the page of the *McNabb* opinion to which attention was thus directed, the Court had spelled out the distinction between the requirements of due process and the standards by which the administration of justice in the federal courts should be judged, saying:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The distinction thus formulated soon found illustration in *Lyons* v. *Oklahoma*, 322 U. S. 596. There, the Court was confronted with action quite similar to that condemned in the *McNabb* case, but nonetheless ruled that no due process question was presented.

Applying the doctrine of these cases to the facts at bar, it becomes apparent that, even if the petitioners had established that New York County's special jury system was not operated in accordance with the rules laid down in the *Thiel* case (but see *supra*, Point II, pp. 6-19), they would still have failed to raise a question under the due process clause.

B. *Since the petitioners do not belong to any excluded class and have failed to show how the alleged exclusion could have affected the verdict, they are in no position to raise a question of equal protection.*

Despite petitioners' unsupported statement to the contrary (brief, p. 23), alleged discrimination in selecting a jury can raise a question of equal protection only where the convicted defendant is a member of the class claimed to have been excluded and can show wherein he has been "prejudiced by the wrongful exclusion" (*Rawlins* v. *Georgia*, 201 U. S. 638; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 225).[12]

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[12] In every case where the Court has set aside a state judgment on the grounds of discrimination in jury selection, it has done so at the instance of a person belonging to the class excluded, and in most of them it has expressly made that circumstance a ground of decision (*Strauder* v. *West Virginia*, 100 U. S. 303, 310; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 117; *Carter* v. *Texas*, 177 U. S. 442, 447; *Rogers* v. *Alabama*, 192 U. S. 226, 231; *Norris* v. *Alabama*, 294 U. S. 587, 589; *Hollins* v. *Oklahoma*, 295 U. S. 394; *Hale* v. *Kentucky*, 303 U. S. 613; *Pierre* v. *Louisiana*, 306 U. S. 354, 362; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; see, also, *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576).

In *Rawlins* v. *Georgia, supra,* the Court gave as a reason for rejecting a challenge under the equal protection clause that (201 U. S., at p. 640):

> "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act."

The Court further observed (*ibid.*):

> "It does not even appear that any of the defendants belonged to any of the excluded classes."

The doctrine was most recently recognized in the *Thiel* case. There the Court, after observing that it was acting in pursuance of its "power of supervision over the administration of justice in the federal courts," ruled that "On that basis" it became unnecessary to determine "whether the petitioner was in any way prejudiced by the wrongful exclusion" or "whether he was one of the excluded class" (p. 225).

In the instant case, the petitioners make no pretense of belonging to any "excluded class." They are not women and do not belong to any of the occupational groups supposedly excluded.[13] The only record evidence bearing upon the humbleness of their "station in life" is the conceded fact that during the years 1938 to 1944 they personally received over $300,000 from only five of the many contractors with whom they were then negotiating on behalf of their respective unions.[14]

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[13] Their own brief (table one, p. 11) classifies "Labor, union representatives" with "Proprietors, manager and officials"—one of the very categories about whose alleged dominance on the panel the petitioners now complain.

[14] In addition, federal court records disclose that the petitioner Fay reported a net taxable income (not including the above sum) of $65,850.77 for the calendar years 1940 to 1942; while the petitioner Bove reported $39,003.29 for a similar period (see *United States* v. *Fay*, U. S. D. C., D. N. J., criminal no. 4260; *United States* v. *Bove*, U. S. D. C., S. D. N. Y., criminal nos. 122-269, 122-375).

It is equally clear that the alleged exclusions could not have affected the verdict rendered. The only issue presented to the jury was whether the $300,000 with which the petitioners concededly enriched themselves had been taken from the contractors under duress or had been received from them in the form of bribes (R. 386, 393, 414, 468; respondent's certiorari brief, p. 2). Upon either theory, the jury was bound to find that the petitioners diverted to their own pockets upwards of $300,000 that contractors were willing to include in their labor costs and, to that extent, had misappropriated funds which rightfully belonged to the laborers they purported to represent. Such a defense, certainly, would have received short shrift from a jury partially or predominantly made up of laboring men. As the district attorney told the jury (R. 455-6):

> "I say to you that if the twelve truest friends that labor ever had were sitting in judgment on the defendants in this case, the testimony would not permit them to do other than denounce by their verdict the actions of the defendants as charged in the indictment in this case." [15]

It follows that the petitioners are in no position to ask the Court to consider whether the regulatory policies promulgated in the *Thiel* and *Ballard* cases (*supra*, p. 22) should be written into the constitutional concept of the equal protection of the laws.

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[15] Illustrative is the circumstance that the petitioner Bove was successfully sued by members of an affiliate of his own international union for making it "easy prey for plunder" [*Canfield* v. *Moreschi* (3rd Dept. 1944) 268 App. Div. 64, 73, aff'd 294 N. Y. 632; also, *Dusing* v. *Nuzzo* (3rd Dept. 1941) 263 App. Div. 59, 62-63]. As to Fay, see R. 527; "Dubinsky to Press Racketeering Test," New York Times, p. 1, col. 3, November 22, 1940.

Conclusion

Section 749-aa of the Judiciary Law—which has been in effect without pertinent change for over half a century—provides appropriate standards for empanelling "fair, competent and impartial" juries in criminal cases. The evidence demonstrates that the officials charged with selecting New York County's list of special jurors acted in obedience to their constitutional oaths of office and without discrimination against any class or category of qualified persons. There is, therefore, no merit in any of the factual claims now advanced by the petitioners.

Moreover, no constitutional question could be presented by showing that the State of New York had left the selection of jurors to the absolute and unguided discretion of administrative officials. Nor does the instant record present the question whether exclusion of women, laborers and "persons of humble station in life" would give rise to a problem under the Fourteenth Amendment. It follows that even if the petitioners had been able to sustain their factual claims, they would still have failed to present a federal question.

The judgments under review should be affirmed.

Respectfully submitted,

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March 1947.

APPENDIX A

A selection of representative headlines concerning strikes, threatened strikes and labor activity in New York City by professional and semi-professional groups and by clerical, sales and kindred workers.

[New York Times, 1946-1947]

Headline	Date	Page and Column
Apartment House Superintendents		
600 Apartment Buildings in City Face Threat of a Strike Thursday [Building Service Employes International Union, AFL]	Dec. 30, 1946	1:2-3
State Acts to Bar Apartment Strike —Men Walk Out in 2 Buildings as Parley Is Set for Today on City-Wide Stoppage • • • [Building Service Employes International Union, AFL]	Dec. 31, 1946	19:4
Bank and Brokerage Employes		
700 Out Two Hours at Stock Exchange—Employes Leave Posts to Vote for Strike but Trading Is Not Interrupted—Supervisors Handle Jobs—Union Meeting, Called to Show Strength, Follows Dispute With Brokerage House [United Financial Employes]	Aug. 15, 1946	27:5

Headline	Date	Page and Column
2 Exchanges Face Threat by Union —AFL Group Weighs Ending of No-Strike Contracts as Offshoot of Kidder Row [United Financial Employes, AFL; Financial Employes Guild, CIO]	Mar. 6, 1947	8:3
Civil Service Employes		
City Workers Seek Increase in Wages—4,000 Ask $350 Rise and Continued Bonus, With Better Working Conditions [sponsored by Central Trades and Labor Council, AFL]	Mar. 27, 1946	20:6
City Welfare Aides Threaten to Quit Unless Pay Rises—Labor Puts Full Strength Into Its Attack on the Mayor's Budget as Inadequate * * * [CIO and AFL units of city workers]	Apr. 14, 1946	1:1
Entertainers		
'No Opera' Threat by Metropolitan —Association Tells Subscribers Coming Season Depends on Guild Dropping Claims—Season Tickets Held Up—Guild to Meet Next Week on Association's Insistence on Right to Pick Staff [American Guild of Musical Artists]	Aug. 17, 1946	15:8
Muzak Silenced in Hotel Strike— Musicians Invoke for First Time the Clause Stopping Service to Hostelries Involved—Juke Boxes Also Barred—Recording Companies to Be Put on the Unfair List if Their Disks Are Used [American Federation of Musicians, AFL]	Sept. 4, 1946	25:8

Headline	Date	Page and Column
AFRA Weighs Strike on 4 Big Networks; Walkout Would Halt All Major Programs [American Federation of Radio Artists, AFL]	Nov. 1, 1946	8:3-4
Newspapermen		
Newspaper Guild Votes for 5 Pacts —Membership of Union in City Accepts Labor Contracts That Bring Pay Increases [Newspaper Guild of New York]	Feb. 5, 1946	15:3
Times Pay Rise Offer Is Rejected by Guild [New York Newspaper Guild, CIO]	Nov. 1, 1946	25:3
Teachers		
Strikes Approved By Teachers Guild—Union Here Urges a Reversal of AFL Policy—CIO Group to Plan Action Tonight [Teachers Guild, AFL; Teachers Union, CIO]	Dec. 20, 1946	6:5
Teachers to Stage Mass Pay Appeals—10,000 Expected at Meeting of the Board of Education—'March on Albany' Slated [Teachers Union, CIO; Teachers Guild, AFL; Teachers Salary Conference]	Jan. 16, 1947	9:1
Telephone Company Employes		
Phone Unions Here File Strike Notice—Three Groups Say They Expect to Join National Walkout Set for April 7 [technical and clerical workers including accounting employes]	Mar. 6, 1947	9:1

APPENDIX B

Addendum to footnote 2 on page 3

Six years after the enactment of this parent special jury statute (Laws of 1896, Ch. 378), the Court upheld its constitutionality (*Hall* v. *Johnson*, 186 U. S. 480).

In that case, the petitioner had been convicted of murder in the first degree and sentenced to death upon a verdict rendered by a special jury. After unsuccessfully challenging the constitutionality of the statute before the New York Court of Appeals (see *People* v. *Hall*, 169 N. Y. 184, 193-194), he sued out a writ of habeas corpus in the United States Circuit Court, alleging that he was "without means to prosecute a writ of error" (*Hall* v. *Johnson*, transcript of record, p. 10). He contended that the trial court had been without "jurisdiction to try the indictment" and that its proceedings had been "null and void" (*id.*, p. 10) because the statute pursuant to which the jury had been drawn "was repugnant to section 1 of the fourteenth amendment" (*id.*, pp. 6, 13) and because, even assuming the constitutionality of the statute, gross irregularities (not here relevant) had occurred in its application (*id.*, pp. 6-10, 13-14). The statute was challenged on the ground that it provided for a jury "taken from a particular body of citizens and not from the general body of the county as was provided in all cases wherein such special jury was not drawn," and, accordingly, that a defendant tried before such special jury "was denied the equal protection of the laws" (*id.*, p. 6).

The Circuit Court (LACOMBE, C.J.) denied the writ, but allowed an appeal to this Court (*id.*, pp. 12-13). This Court affirmed the order of the Circuit Court "on the authority of *Storti* v. *Massachusetts*, 183 U. S. 138, 141; *Brown* v. *New Jersey*, 175 U. S. 172; *Andrews* v. *Swartz*, 156 U. S. 272."

Since that decision, the special jury has been in almost continuous use in New York County. See, for example, cases in which judgments of death rendered upon verdicts of special juries have been affirmed by the Court of Appeals, *People* against: *Flanigan* (1903) 174 N. Y. 356; *Conklin* (1903) 175 N. Y. 333; *Hampartjoomian* (1909) 196 N. Y. 77; *Bowser* (1909) 196 N. Y. 296; *Loose* (1910) 199 N. Y. 505; *Gambaro* (1910) 199 N. Y. 511; *Wood* (1911) 201 N. Y. 158; *Wolter* (1911) 203 N. Y. 484; *Cain* (1912) 206 N. Y. 202; *Collins* (1912) 206 N. Y. 668; *Lingley* (1913) 207 N. Y. 396; *Roberts* (1912) 207 N. Y. 669; *Mulraney* (1913) 207 N. Y. 698; *Muehlfeldt* (1913) 209 N. Y. 550; *Seidenshner* (1914) 210 N. Y. 341; *Eng Hing* (1914) 212 N. Y. 373; *McKenna* (1914) 212 N. Y. 574; *Campanelli* (1915) 213 N. Y. 687; *Vogt* (1915) 213 N. Y. 688; *Draniewicz* (1915) 213 N. Y. 695; *Becker* (1915) 215 N. Y. 126; *Perry* (1915) 215 N. Y. 737; *Flack* (1915) 216 N. Y. 123; *Leggio* (1916) 216 N. Y. 764; *Shilitano* (1916) 218 N. Y. 161; *Bradford* (1916) 218 N. Y. 729; *Tolas* (1916) 218 N. Y. 747; *Bambrick* (1916) 218 N. Y. 751;

Impoluzzo (1917) 220 N. Y. 627; *Waite* (1917) 220 N. Y. 714; *Jazra* (1917) 221 N. Y. 485; *Waldenen* (1917) 221 N. Y. 521; *Mulholland* (1917) 221 N. Y. 623; *Schuster* (1917) 221 N. Y. 624; *Linton* (1918) 224 N. Y. 609; *Abbruzzo* (1919) 227 N. Y. 554; *Mihiterian* (1919) 227 N. Y. 617; *Harrison* (1919) 227 N. Y. 647; *Walters* (1920) 228 N. Y. 574; *Blaza* (1920) 229 N. Y. 540; *Sansone* (1920) 229 N. Y. 600; *Giordano* (1921) 231 N. Y. 633; *McCormick* (1922) 232 N. Y. 569; *Rosenwasser* (1922) 233 N. Y. 505; *Raffaele* (1922) 233 N. Y. 590; *Taizo* (1922) 233 N. Y. 662; *Boddy* (1922) 234 N. Y. 530; *Marino* (1923) 235 N. Y. 560; *Cusamano* (1923) 235 N. Y. 560; *Lozado* (1924) 238 N. Y. 597; *Marion* (1924) 238 N. Y. 635; *Miller* (1925) 240 N. Y. 698; *Hoyer* (1926) 243 N. Y. 572; *Garguila* (1926) 243 N. Y. 573; *Williams* (1926) 243 N. Y. 640; *Humes* (1926) 243 N. Y. 641; *Goldson* (1926) 243 N. Y. 641; *Bradley* (1926) 244 N. Y. 503; *Heslin* (1927) 245 N. Y. 591; *Albrecht* (1927) 245 N. Y. 617; *Seiler* (1927) 246 N. Y. 262; *Ecker* (1928) 247 N. Y. 538; *Hyland* (1928) 247 N. Y. 604; *Graham* (1928) 248 N. Y. 588; *Edel* (1929) 252 N. Y. 539; *Hirsch* (1930) 254 N. Y. 570; *Arata* (1931) 255 N. Y. 374; *Lytton* (1931) 257 N. Y. 310; *De Vore* (1932) 258 N. Y. 568; *Baumann* (1932) 259 N. Y. 600; *Corbellini* (1932) 259 N. Y. 591; *Harris* (1932) 260 N. Y. 511; *O'Neill* (1932) 260 N. Y. 523; *Brown* (1932) 260 N. Y. 594; *Jameison* (1932) 260 N. Y. 134; *Turner* (1932) 260 N. Y. 626; *Lopez* (1933) 261 N. Y. 667; *Rugama* (1933) 261 N. Y. 685; *Willis* (1933) 263 N. Y. 516; *Vogel* (1934) 264 N. Y. 604; *Leonti* (1934) 266 N. Y. 409; *Walsh* (1934) 265 N. Y. 611; *Mitchell* (1934) 266 N. Y. 15; *Leylegian* (1935) 266 N. Y. 606; *Jerossi* (1935) 267 N. Y. 505; *Brown* (1935) 268 N. Y. 698; *Orley* (1935) 269 N. Y. 509; *Flores* (1936) 271 N. Y. 648; *Springer* (1936) 272 N. Y. 624; *Russell* (1936) 272 N. Y. 647; *Fiorenza* (1936) 272 N. Y. 642; *Chew Wing* (1937) 274 N. Y. 477; *Wilson* (1937) 276 N. Y. 539; *Roberts* (1938) 277 N. Y. 688; *Lunse* (1938) 278 N. Y. 303; *Guariglia* (1938) 279 N. Y. 707; *Bohan* (1939) 279 N. Y. 723; *Gati* (1938) 279 N. Y. 631; *Alex* (1939) 279 N. Y. 760; *Sacoda* (1939) 281 N. Y. 827; *McDonald* (1939) 281 N. Y. 794; *Thingstead* (1939) 282 N. Y. 577; *Horn* (1940) 282 N. Y. 756; *Pryor* (1940) 283 N. Y. 623; *Ertel* (1940) 283 N. Y. 519; *Brown* (1940) 284 N. Y. 753; *Balatnicow* (1940) 284 N. Y. 787; *Celline* (1941) 285 N. Y. 736; *Garrett* (1941) 285 N. Y. 810; *Crumble* (1941) 286 N. Y. 24; *Ancrum* (1941) 287 N. Y. 633; *Esposito* (1942) 287 N. Y. 389; *Richardson* (1941) 287 N. Y. 629; *Mardavich* (1942) 287 N. Y. 344; *Clark* (1942) 289 N. Y. 618; *Sonsky* (1942) 289 N. Y. 722; *Mendez* (1942) 289 N. Y. 751; *Cullen* (1943) 290 N. Y. 667; *Castellano* (1942) 289 N. Y. 753; *Peller* (1943) 290 N. Y. 905; *De Jesus* (1943) 290 N. Y. 789; *Maduro* (1943) 291 N. Y. 529; *Regan* (1944) 292 N. Y. 109; *Almodovar* (1943) 291 N. Y. 628; *Pariti* (1944) 292 N. Y. 568; *De Lutro* (1944) 292 N. Y. 683; *Yun Tich Li* (1944) 293 N. Y. 742; *Little* (1945) 295 N. Y. 656. Appeals from three such judgments are now pending.